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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HUNTER SLOAN BODINE, Plaintiff and Appellant, v. WAWANESA GENERAL INSURANCE COMPANY, Defendant and Respondent.	B156620 (Los Angeles County Super. Ct. No. BC252869)

Appeal from a judgment of the Superior Court of Los Angeles County. Owen Lee Kwong, Judge. Reversed and remanded.

Rosoff, Schiffres & Barta, H. Steven Schiffres and Michelle K. Sugihara for Plaintiff and Appellant.

Law Offices of Kenneth N. Greenfield, Kenneth N. Greenfield and Daniel R. Gamez for Defendant and Respondent.

Appellant Hunter Sloan Bodine appeals from the trial court's striking, pursuant to Code of Civil Procedure section 425.16 (the anti-SLAPP statute), his second cause of action for malicious prosecution in his first amended complaint (FAC) against defendant and respondent Wawanesa General Insurance Company (Wawanesa).[1] Bodine sued his insurer after he was prosecuted for insurance fraud, the prosecution was dropped by the District Attorney, and Bodine was found factually innocent in the criminal proceedings. The trial court dismissed the malicious prosecution action against the insurer because it concluded Bodine "cannot show that Wawanesa commenced or directed the action of the prosecutor." Appellant claims this conclusion was fact-based, the court improperly weighed the evidence, and the court compounded its error by abusing its discretion in denying Bodine's motion to a continuance to enable Bodine to conduct discovery to obtain further evidence of his claims. We shall reverse for failure to grant the continuance.

PROCEDURAL HISTORY

Bodine purchased an automobile insurance policy from Wawanesa. The policy lapsed, during which time Bodine was involved in an automobile accident. The policy was subsequently reinstated, but not retroactively. The attorney for the allegedly injured party contacted Bodine, and Bodine first reported the accident to the insurer on August

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[1] "SLAPP" is an acronym for Strategic Lawsuits Against Public Participation. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) "An order granting or denying a special motion to strike shall be appealable under Section 904.1" (Code Civ. Proc., § 426.16, subd. (j).) Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

Bodine's initial complaint alleged breach of fiduciary duty, libel and slander, and gross negligence. Wawanesa successfully demurred and Bodine was granted leave to amend. The court never reached Wawanesa's motion to strike the libel and slander claim under the anti-SLAPP statute. The operative FAC alleged both malicious prosecution and breach of the covenant and good faith and fair dealing. Bodine's appeal does not challenge dismissal of the claim for breach of the implied covenant of good faith and fair dealing.

24. In the recording taped by insurer on August 26, 1999, Bodine confirmed the date of the accident as Saturday, July 17, after reinstatement of the policy, rather than the actual date, Thursday, July 8, 1999.[2] Wawanesa subsequently discovered the discrepancy in the dates and reported Bodine to the Department of Insurance. A felony complaint for insurance fraud resulted.

The criminal case against Bodine for insurance fraud was successfully concluded in his favor. The prosecutor dismissed the complaint, and thereafter on Bodine's motion the criminal court signed an order finding Bodine factually innocent, i.e., "that no reasonable cause exists to believe that the Petitioner committed the offense for which the arrest was made, and Petitioner is factually innocent of the charges asserted against him and that all proceedings against Petitioner were dismissed . . . ."

Bodine then initiated this lawsuit against Wawanesa.[3] The operative FAC alleged in detail the history of the litigation and causes of action for breach of implied covenant of good faith and fair dealing, no longer at issue on appeal, and for malicious prosecution. Bodine alleged he was involved in an automobile accident with Kenneth Booker on July

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[2] Bodine's explanation is that the July 17 date he "admitted" was the date of loss listed on the letter he received from attorney for the person he rear-ended. According to Bodine, he renewed his policy when he discovered it had lapsed; informed Wawanesa of the accident as required by his policy; and asked Wawanesa what he should do, but did not request more from the insurer. When Bodine later realized July 8 was the correct date, he contends he so informed Wawanesa.

[3] Bodine's initial complaint was for breach of fiduciary relationship, libel and slander, and gross negligence. Wawanesa demurred and filed a special motion to strike the second cause of action for libel and slander pursuant to section 425.16. The motion to strike was based on the argument that Bodine could not establish the probability of prevailing on his claim in that Wawanesa's communications were privileged under Civil Code section 47 and Insurance Code section 1872.5 and that Bodine cannot show malice. Bodine opposed the motion and asked that, should it be granted, the court grant the order without prejudice to allow Bodine to replead and to give Bodine leave to conduct reasonable discovery. The demurrer was sustained with leave to amend. The special motion to strike the cause of action for libel and slander was taken under submission.

8, 1999, and did not know that his Wawanesa policy had lapsed for nonpayment of premium and was not effective on the date of the accident. He received a copy of a letter, attached to the complaint,[4] from Booker's attorney on or about August 20, 1999, and notified Wawanesa of Booker's claim of an accident on July 17, 1999. Allegedly because of the letter (which requested Bodine to send the original of the letter to his insurance company) and Bodine's communication, the Wawanesa claims file was set up with the date of July 17, 1999, as the date of the accident.

Bodine further alleges that on or about August 26, 1999, Wawanesa took a recorded statement from him concerning the Booker claim. The adjuster erroneously indicated July 17 as the date of loss. "As reflected by the transcript of the recording, Plaintiff hesitated, given that the date of loss was not certain in his mind, and replied that he wanted to, 'double check that date.' However, instead of allowing Plaintiff Bodine the opportunity to check the date as he requested, Wawanesa's adjuster rejoined, 'We have it as a Saturday.' Plaintiff who had not committed the accident date to memory, who had not written the date down, and who, because [of the minor nature of the accident] had not even thought of the matter until he received Booker's counsel's August 20 Notice of Claim, responded affirmatively." He had no intention to mislead Wawanesa and was "without any notice or awareness of the significance" of the date.

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[4] That letter states the date of the incident as July 17, 1999. It is Bodine's contention that that mistaken date was the reason for his statement of date to Wawanesa. Although the FAC alleges upon information and belief that a copy of the letter was sent to Wawanesa at about the same time, the insurer denies receiving that letter from anyone prior to filling out the SFC Referral Form in which Wawanesa reported the insured made false statement on at last two separate occasions when he represented the date of loss as July 17, 1999.

Attached to the FAC in addition to the letter from counsel for Kenneth Booker was the criminal court's order on Bodine's petition for finding of factual innocence, quoted above.

The FAC further alleges that Bodine had no additional contact from Wawanesa about the Booker claim until June 2, 2000, when he submitted to a second recorded statement with the Wawanesa adjuster. At that point, Bodine allegedly correctly identified the accident date as July 8, acknowledged he was uninsured at the time of the accident, and asked the adjuster what steps he could take to have a review board extend coverage. Wawanesa allegedly did nothing to investigate the source of the erroneous date and "the innocent product of Bodine's mistaken reliance on Booker's counsel's letter and the Wawanesa adjuster's reaffirmation of the date stated by Booker's counsel to open the first recorded statement."

Moreover, allegedly as "a direct consequence of Wawanesa's referral and recommendation to the Department of Insurance," Bodine was arrested, jailed and charged with insurance fraud. The criminal complaint was dismissed with prejudice on October 5, 2000; on December 1, 2000, the criminal court granted Bodine's petition for a finding of factual innocence.

The FAC alleged that after referral to the Department of Insurance, Wawanesa obtained written evidence and proof exculpating Bodine and establishing the source of the erroneous date. Nevertheless, Wawanesa allegedly "continued to insist that the District Attorney's office proceed with the prosecution of [Bodine] for insurance fraud and insisted notwithstanding such exculpatory proof, that such charges against Plaintiff not be voluntarily dismissed." Wawanesa allegedly also "insisted that the District Attorney's office oppose" Bodine's petition for a finding of factual innocence and "[w]ithout any competent proof to such effect, . . . assured the District Attorney that [Bodine] was a liar and a fraud, and speculated that Plaintiff must have somehow conspired with Booker's counsel to misrepresent the accident date in order to obtain coverage for Booker's claim and thereby perpetrate insurance fraud. Defendant Wawanesa did so with the purpose and intent that the District Attorney proceed with its prosecutorial stand against Bodine" and acted without probable cause in the "initiation maintenance and criminal prosecution [while Wawanesa allegedly] could not and did not

honestly reasonably and in good faith believe that [Bodine] was guilty of the crime charged – insurance fraud."

There were also allegations of malice; Wawanesa's failure to advise the Department of Insurance of all the exculpatory facts and instead to advise with the intent Wawanesa's recommendations be relied upon by the Department of Insurance and District Attorney's office despite evidence of innocence; refusal to withdraw opposition to the petition for finding of factual innocence, and ill will and prejudice toward Bodine as well as "intent to vex, injur[e], annoy and cause harm to" him. Bodine sought attorney fees of $40,000 incurred to defend and dismiss the criminal charges; punitive damages; and damages for incarceration, loss of reputation, and emotional harm.

Wawanesa filed its special motion to strike and a demurrer to the FAC.[5] Its motion to strike argued regarding the malicious prosecution cause of action that its conduct was privileged pursuant to Insurance Code sections 1872.5 and 1874.4 and Bodine could not meet his burden of showing a probability of prevailing on the malicious prosecution cause of action in that l) the insurer was not actively instrumental in causing Bodine's prosecution; 2) the insurer had probable cause for submitting the Department of Insurance referral form; and 3) Bodine cannot meet his burden of showing malice.

A declaration by senior claims specialist Richard C. Albanese was filed in support of the motion to strike.[6] The declaration asserts that the insurance records establish Bodine's policy was cancelled at 12:01 a.m. on July 2, 1999, for nonpayment of premium; a notice of final termination was sent to Bodine on July 3; the accident occurred on July 8; and on July 9, Bodine mailed his premium payment to Wawanesa

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[5] The demurrer was confined to the first cause of action for breach of the covenant of good faith, not at issue on appeal. There was no demurrer challenging the malicious prosecution cause of action.

[6] The record on appeal does not contain exhibits to the declaration of the claims adjuster. Transcriptions of the recorded statement were among the attachments.

without informing the insurer he had just been involved in an accident. Coverage was reinstated on July 10.

According to the claims adjuster, Bodine reported he had received a letter from Booker's counsel but did not send a copy of the letter to Wawanesa.[7] Bodine first contacted his insurer on August 24 and advised that the date of the accident was July 17. In his recorded statement on August 26, Bodine was asked if the accident occurred on July 17, the date first reported two days earlier, and after checking replied in the affirmative. He did not correct the adjuster when she stated the date was a Saturday; July 8, the actual date, was a Thursday. Moreover, the declaration of the claims adjuster supports Wawanesa's position that it did no more than report the facts to the Department of Insurance and provide the claims file when requested and that the decision to prosecute and any position on the decision to dismiss charges were made independently. He had been told he would be subpoenaed as a witness by Bodine's counsel for a hearing on his petition for finding of factual innocence, but the adjuster was never subpoenaed and Wawanesa was not told of the date of the hearing.

A verification of the FAC was filed following Wawanesa's filing of its special motion to strike.[8] Bodine again sought judicial notice of the order finding his factual

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[7] The claims adjuster declared that Wawanesa never received the letter from Booker's counsel from anyone, "including Mr. Booker, his attorney, or [Bodine,] prior to filling out the SFC Referral Form and sending same to the Department of Insurance as required."

[8] Wawanesa argued that even a verified complaint, if grounded in facts alleged on information and belief, is inadmissible to prove Bodine's case. (*Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 656, overruled on other grounds in *Equilon Enterprises v. Consumer Cause, Inc*., *supra*, 29 Cal.4th 53, 68, fn. 5.) [pleadings merely frame the issues to be decided and an averment on information and belief is inadmissible at trial and thus cannot show a probability of prevailing on the claim"]; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497 [same].)

innocence in the criminal proceeding.[9] In addition, Bodine sought a continuance to the special motion to permit necessary discovery, which had been stayed pursuant to section 425.16, subdivision (g).[10] The requested discovery included production of the entire claims file;[11] the litigation file of the prosecuting attorneys in the criminal action including any records of communications between the prosecuting attorneys and Wawanesa, most particularly regarding Wawanesa's involvement in the continuing prosecution of the insurance fraud claim; depositions of those involved in referring the matter to the Department of Insurance; and communications between Booker, his counsel and Wawanesa.

Court's rulings

After taking the matter under submission on December 17, 2001,[12] in a rationale it would later abandon, the trial court on January 4, 2002, initially ruled that Wawanesa's

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[9] Wawanesa sought judicial notice of the criminal court file in *People v. Bodine*, Los Angeles Superior Court Case No. BA 205792, particularly the reporter's transcript of the December 1, 2000, hearing on Bodine's petition for finding of factual innocence.

[10] The continuance was sought for a period of not less that six months in order to permit Bodine "to conduct necessary and appropriate discovery into the matters raised in connection with" the motion to strike. Bodine represented that the motion to strike "implicates various factual issues as to which [he] is unable to produce evidence or supply information by reason of the absence of discovery in this matter to date."

[11] Wawanesa asserts Bodine had had the entire claim file for over a year. The insurer adds that, pursuant to Bodine's motion in the criminal proceeding, the records in that matter were ordered to be sealed and subsequently destroyed.

[12] At the hearing on December 17, 2001, the trial court expressed its belief that "[o]ne of the problems of the malicious prosecution, counsel, is the prosecution here was by a governmental agency and as you know as citizens of the world we don't control what the government does with regard to whether to prosecute. [¶] The underlying facts of this case essentially involve a situation that under the mandatory reporting requirement of the insurance company they made a report and as a result thereby the prosecution agency initiated the conduct in which they did which ultimately resulted in obviously no conviction here -- [¶] that they don't maliciously prosecute, all they do is report." Wawanesa referred to the transcript of the criminal proceeding as evidence of the insurer's lack of participation in any objection by the prosecutor to the factual finding of

"statements are absolutely privileged under Ins. Code Section 1874.4. Fremont Compensation Co. v. Sup Ct. (1996) 44 Cal.App.4th 867. Therefore, plaintiff cannot prevail on the merits on either of his claims, as both claims are based upon the privileged statements. As the statements themselves are a protected exercise of free speech, these claims fall within the SLAPP ambit, and this Motion must be granted." The trial court also denied Bodine's motion for continuance of the SLAPP motion.[13] Moreover, given the granting of the anti-SLAPP motion, the trial court found the demurrer to be moot.

Wawanesa then sought to recover its attorney fees and costs, totaling $14,731.28. Bodine appealed from the minute order of January 4, 2002, granting Wawanesa's special motion to strike.

Bodine thereafter opposed Wawanesa's claim for attorney fees. Part of his argument was the contention that since even an absolute privilege does not insulate a defendant from a malicious prosecution claim, attorney fees should not be awarded. A hearing was held on the motion to recover fees and costs on March 12, 2002. In arguing that the trial court had been incorrect on the merits, Bodine's counsel referred to the

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innocence. Wawanesa argued it was "out of the loop" and "didn't even know the case was being dismissed until they showed up to [the] motion to compel the claims filed which they then gave to [Bodine]." Bodine's counsel's request to argue on the motion for continuance was met with a reply that the court would take it under submission and counsel had been given "more than sufficient time to make the argument."

[13] The minute order denying the initial request for continuance stated: "In order to show good cause for a continuance on a SLAPP Motion, a plaintiff must show what additional facts he expects to uncover and how these facts would affect the burden of proof. Sipple v. Found for Natl Progress, (1999) 71 Cal.App.4th 226, 247. [¶] Plaintiff must show what facts he seeks, and how they would affect the ruling. Fisher v. Gibson, 90 Cal.app.4th 275, 287. Plaintiff submits a detailed list of the discovery he would like to seek, but fails to establish how any of this evidence – if it exists – would support his claims. Even if plaintiff could establish that defendant acted with malice, defendant had a statutory obligation to report the suspected fraud, and this is absolutely privileged by 47(c) by way of Ins. Code Section 1874.4. Therefore, no evidence would support plaintiff's claims."

proposed statement of decision by Wawanesa, which relied on lack of proof malice, rather than the ground used by the trial court to grant the motion to strike. Counsel reiterated his belief that the trial court "is totally wrong on malicious prosecution . . . " and again commented that he had not been given a continuance to do discovery so as better to prove malice.

The trial court's final order and judgment, filed March 28, 2002, summarized the facts as presented and concluded there was no breach of an implied covenant because Bodine could not establish an enforceable contract and the insurer's statements were absolutely privileged under Insurance Code section 1874.4. Furthermore, the court concluded that the malicious prosecution claim "fails because Defendant [insurer] did not prosecute the criminal action against Plaintiff. A malicious prosecution claim requires Plaintiff to prove that the prior action 1) was commenced by or at the direction of Defendant; 2) was pursued to a legal termination in Plaintiff's favor; 3) was brought without probable cause; and 4) was initiated with malice. Jaffe v. Stone, (1941) 18 Cal.2d 146, 149. Moreover, it has recently been held that a cause of action for malicious prosecution is not exempt from a special motion to strike. (*Formulas, Inc. v. LaMarche* (B14670 filed March 25, 2002 [97Cal.App.4th 1], 2002 DJDAR 3239 [review granted and superceded while this case was on appeal by *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728].)"

The trial court explained its reasoning: "Although Plaintiff alleges that Defendant 'insisted' that the prosecutor proceed with the charges and insisted that the prosecutor oppose Plaintiff's Petition, any misconduct by Defendant is irrelevant because the prosecutor and not Defendant was controlling the litigation. Regardless of whether or not Defendant had probable cause or acted with malice, Plaintiff cannot show that Defendant commenced or directed the action of the prosecutor or the arresting agency. Even if Plaintiff's allegations of malice are true, the litigation was controlled by the prosecutor and others and not by Defendant. Anything less, would result in an abrogation and abandonment of the duties and responsibilities of the prosecutor. There is no evidence that this occurred."

Citing *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 247, the trial court denied Bodine's motion for a continuance of the special motion to strike. In addition, the court granted attorney fees of $3361.75 and costs of $23. Judgment was entered and this appeal follows.

CONTENTIONS ON APPEAL

Appellant contends: 1. The trial court erred in striking the malicious prosecution cause of action. 2. The trial court erred in denying Bodine's motion to continue the hearing in order to conduct discovery. 3. If the court affirms the trial court's ruling, this court should exercise discretion not to grant attorney fees on appeal.

Respondent contends: 1. Wawanesa followed the provisions of the Fraud Prevention Act in reporting Bodine's suspected fraudulent claim. The mere reporting of suspected fraud does not subject Wawanesa to liability for malicious prosecution. 2. Bodine has not proved up a prima facie case for malicious prosecution. 3. The trial court properly denied Bodine leave to conduct discovery in that nothing he could discover would change the fact that the district attorney, who received information from the Bureau of Fraudulent Claims, instigated the criminal proceedings.

DISCUSSION

1. Section 425.16

As our Supreme Court stated in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1111-1113, footnote omitted: "Section 425.16 provides, inter alia, that 'A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).) 'As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, *or*

judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or *judicial body*, or any other official proceeding authorized by law . . . .' (*Id*., subd. (e).)" (Italics added.)

"Section 425.16, subdivision (b)(1) requires the court to engage in a two- step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th 53, 67.) To satisfy plaintiff's burden to show probability of prevailing "the plaintiff need only have '"stated and substantiated a legally sufficient claim."' [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." (*Id*. at p. 89.)

In determining whether plaintiff has demonstrated a probability of prevailing, "[t]he evidence presented must be admissible (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654 [49 Cal.Rptr.2d 620]) and the trial court does not weigh the evidence. (*Paul for City Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1365.) Rather, a probability of prevailing is established if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for plaintiff. (*Ibid*.) If the plaintiff meets its burden the motion must be denied.

(*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 627 [107 Cal.Rptr.2d 504]; *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 745-746 [36 Cal.Rptr.2d 687].)" (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188-1189.)

On appeal, both issues are reviewed de novo. Thus, we review independently whether the complaint arises from exercise of a valid right to free speech and petition and if so, whether the plaintiff established a probability of prevailing on the complaint. (*Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919.) Although there had been some controversy about the application of anti-SLAPP statutes to malicious prosecution actions, California courts have held that section 425.16 applies in the context of malicious prosecution lawsuits, (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087) a view recently upheld by our Supreme Court in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, ___, 74 P.3d 737, 745 ["we decline to create a categorical exemption from the anti-SLAPP statute for malicious prosecution causes of action."]

2. Given the record presented, the trial court did not err in striking the malicious prosecution cause of action.

"'[I]n order to establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate "that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]."' (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 [254 Cal.Rptr. 336, 765 P.2d 498].)" (*Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 313.)

Appellant claims Wawanesa is liable for malicious prosecution because it instigated the institution of criminal proceedings against Bodine. Wawanesa contends it merely made the reports required by Insurance Code sections 1871 and 1872.4; that the Bureau of Fraudulent Claims conducted its own investigation pursuant to Insurance Code

section 1872.4, subdivision (a); and the prosecutor similarly determined on his own to prosecute Bodine. The trial court agreed with Wawanesa that the prosecutor and not the insurer was responsible for the prosecution and therefore concluded that Bodine had no probability of prevailing at trial, a requirement for denial of the 425.16 motion to strike.

The trial court apparently believed that the prosecutor and not a party reporting a crime is completely and solely responsible for a criminal prosecution. Although true that the prosecutor is usually the responsible party, the law in California recognizes malicious prosecutions for arrests and prosecutions in criminal actions instigated by those other than the prosecutorial agencies that pursue the actual arrest and/or filing of charges. (See, e.g., cases collected at 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 418, p. 503-504.)[14]

Bodine has failed to make a prima facie case that Wawanesa was "actively instrumental in causing the prosecution" and did so with malice and without probable cause. The admissible evidence presented to the trial court demonstrates that the insurer merely reported the actual (and admittedly false) statements made by Bodine to the proper authorities. If more happened, there is no admissible evidence in the record to support such a finding. (Compare *Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 897 [would be malicious prosecution if plaintiff, an attorney, can prove allegation that insurer and others falsely charged him with theft of a file in order to discredit him out

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[14] As BAJI 7.30 explains, one of the essential elements of a claim for malicious prosecution is that the "defendant initiated or was actively instrumental in [procuring the arrest] [the prosecution of the plaintiff in a criminal action] [the commencement or maintenance of a civil proceeding against the plaintiff] . . . ." Given the doctrine of prosecutorial immunity (Gov. Code, § 821.6 ["A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause"], there would otherwise be little chance of a civil remedy for malicious prosecution in a criminal case.

of anger at his success in a civil case];[15] *Sandoval v. Southern Cal. Enterprises, Inc.* (1950) 98 Cal.App.2d 240, 248 [manager of dance hall instigated prosecution to discourage plaintiff from bringing civil action for battery after his employees brutally beat plaintiff, and manager used police officer friends to effect plaintiff's arrest].) Given the admissible evidence presented, the trial court did not err in granting the special motion to strike.

Nevertheless, we are concerned that the trial court denied Bodine's motion to continue the hearing in order to conduct discovery. Appellant may or may not be provided with admissible evidence of the insurer's malice and role in the underlying criminal case. As we next discuss, he should have been granted discovery that might prove his case.

3. The trial court erred in denying Bodine's motion to continue the hearing in order to conduct discovery.

Section 425.16, subdivision (g), states in relevant part: "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. *The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision*." (Italics added.) (*See Schroeder v. Irvine City Council* (2002) 97

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[15] As the court stated in *Williams v. Hartford Ins. Co., supra*, 147 Cal.App.3d 893, 897, "Here it is alleged that Hartford caused its employees not only to make the original false statement to law enforcement personnel, but also caused them to testify falsely before the grand jury. If true, one element of an action for malicious prosecution was properly pleaded. [¶] Admittedly, in most cases, a person who merely alerts law enforcement to a possible crime and a possible criminal is not liable if, law enforcement, on its own, after an independent investigation, decides to prosecute. However, nothing in the complaint speaks of an investigation by law enforcement as leading up to the grand jury indictment ultimately returned against appellant. Under those circumstances, the defense of investigation is a matter for affirmative defense, not a ground for demurrer."

Cal.App.4th 174, 183 ["the filing of a section 425.16 motion to strike stays discovery until the motion is ruled on, although the court has discretion to permit specified discovery for good cause. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1052, [61 Cal.Rptr.2d 58].)"])

Bodine sought a continuance for discovery related to the issues of instigation and control of the prosecution and contends that the trial court erred in denying his request. He argues that in switching from a law-based to a fact-based rationale for striking the malicious prosecution cause of action, the trial court should have revisited his motion for continuance to conduct discovery, which had been automatically stayed with the filing of the 425.16 motion.

As the court stated in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 37 Cal.App.4th 855, 867-868, "We acknowledge, however, that the discovery stay and 30-day hearing requirement of section 425.16 literally applied in all cases might well adversely implicate a plaintiff's due process rights . . . . Motions under section 425.16 commonly will be filed early in the legal proceedings, before the plaintiff has the opportunity to conduct (or complete) significant and necessary discovery. If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated. The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees. Furthermore, while the statute says the motion to strike 'shall be noticed for hearing not more than 30 days after service' (§ 425.16, subd. (g)), nothing therein prevents *the court* from continuing the hearing to a later date so that the discovery it authorized can be completed where a reasonable exercise of judicial discretion dictates the necessity therefor."

Our Supreme court in *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th 728, ___ [74 P.3d 737, 745, recently cited the trial court's power to order specified discovery as a way to mitigate the impact of anti-SLAPP motions. Although such a continuance is reviewed for an abuse of discretion (*Robertson v. Rodriquez* (1995) 36 Cal.App.4th 347, 357), that discretion must be exercised liberally in favor of the party whose right to sue will otherwise be prematurely terminated by the anti-SLAPP motion.

The trial court apparently misunderstood an element of malicious prosecution in criminal trials, erroneously concluding that because the final decision to prosecute is by the District Attorney's office, no other party can possibly be an "instigator" of the criminal prosecution for malicious prosecution purposes. For example, the trial court stated: "Although Plaintiff alleges that Defendant 'insisted' that the prosecutor proceed with the charges and insisted that the prosecutor oppose Plaintiff's Petition, *any misconduct by Defendant is irrelevant because the prosecutor and not Defendant was controlling the litigation.* Regardless of whether or not Defendant had probable cause or acted with malice, Plaintiff cannot show that Defendant commenced or directed the action of the prosecutor or the arresting agency. Even if Plaintiff's allegations of malice are true, the litigation was controlled by the prosecutor and others and not by Defendant. Anything less, would result in an abrogation and abandonment of the duties and responsibilities of the prosecutor. There is no evidence that this occurred." (Italics added.)

As explained above, the law is to the contrary. (See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 418, p. 503-504.) Given the trial court's mistaken belief about instigation of criminal proceedings, there could be no good cause to grant a continuance for Bodine to discover facts demonstrating that Wawanesa "was actively instrumental in causing the prosecution." (*Ibid*.)[16] Bodine should have been granted a

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[16] Thus, the trial court's reliance on *Sipple v. Foundation For Nat. Progress*, *supra*, 71 Cal.App.4th 226, 247, in denying Bodine's motion for discovery is misplaced. In *Sipple*, appellant had requested written discovery and depositions of many of the people

continuance for such discovery, which might produce information about the instigation of the criminal proceedings and any malice by Wawanesa.

4. Attorney fees.

Section 425.16, subdivision (c), provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 362.) Because we reverse the judgment, Wawanesa will not be entitled to attorney fees on either at trial or on appeal unless ultimately successful on its motion (see *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287) or otherwise after a successful appeal.

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involved, including three experts, and the appellate court noted: "On appeal, appellant does not explain what additional facts he expects to uncover, or why such far-ranging discovery is necessary to carry his burden of showing . . . malice. (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190-1191 [31 Cal.Rptr.2d 193].) The most he argues is that he should be 'permitted to test respondents' self-serving declarations and elicit circumstantial evidence through discovery before being subjected to dismissal for failure to establish a prima facie case.'"

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court for further proceedings including, if and when appropriate, a determination of attorney fees on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.